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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1553

JOHN J. GILLIGAN, ET AL., PETITIONERS

v.

CRAIG MORGAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-35) is reported *sub nom. Morgan* v. *Rhodes* at 456 F. 2d 608.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1972. On May 15, 1972, Mr. Justice Stewart extended the time for filing the petition for a writ of certiorari to May 22, 1972. The petition was filed on May 20, 1972, and was granted on October 24, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

32 U.S.C. 110 provides:

> The President shall prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard.

The pertinent federal and state regulations are set forth in the Appendix, *infra* pp. 29–45.

QUESTIONS PRESENTED

1. Whether respondents' claim—that the training, weapons, and orders of the Ohio National Guard deprives or threatens to deprive them of constitutional rights—is justiciable.

2. Whether respondents have standing to bring this suit.

INTEREST OF THE UNITED STATES

Pursuant to its authority under Article I, Section 8, cls. 15 and 16 of the Constitution and 32 U.S.C. 110, the United States, through the Department of the Army, trains members of National Guard units for civil disturbance control duties. It is therefore the Army's training policies and practices which the court of appeals has ordered the district court to review. Furthermore, while operational decisions, such as the kind and amount of force to be used in controlling civil disturbances, are left to the states, the Army and the State of Ohio now observe the same rules pertaining to the use of force in civil disturbances. The policies and practices of the Army with respect to the use of force therefore would be implicated in the review the district court has been directed to

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undertake. Accordingly, the United States has a substantial interest in this case.

STATEMENT

Respondents, on behalf of themselves and all other students at Kent State University, filed a complaint in the United States District Court for the Northern District of Ohio, seeking declaratory and injunctive relief. The complaint, which seeks generally to enjoin the Ohio National Guard from suppressing any future civil disturbances on the Kent State campus until its training and its operating policies have been changed, was dismissed by the district court for failure to state a claim for which relief could be granted (App. 14). The court of appeals ~~reserved~~ reversed (Pet. App. 22).

Although the complaint (which is set forth at App. 3–13) is discursive, the court of appeals construed it as attempting to state three related causes of action. The court unanimously affirmed the dismissal of two of those causes of action, and respondents have not sought certiorari with respect to those claims. However, a divided court reversed the dismissal of the third cause of action, which the court read as raising the following question (Pet. App. 18):

> Was there and is there a pattern of training, weaponing and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary? [Italics omitted.]

The court in effect held that this question fairly stated a claim that the actions of the Ohio National Guard threatened to deprive respondents of life without due process of law, that the claim so stated was justiciable, and that if the claim were sustained, appropriate injunctive relief could be fashioned (Pet. App. 18–21).

SUMMARY OF ARGUMENT

For two separate reasons, respondents' contention—that the training, weapons and orders of the Ohio National Guard deprives or threatens to deprive them of constitutional rights—does not create a justiciable controversy: (1) respondents' complaint does not state a justiciable claim and (2) respondents have no standing to maintain this suit.

1. Respondents seek judicial review of the propiety of the training, weapons and orders of the National Guard. That issue lacks the specificity required for adjudication and would involve the judiciary in inquiries which call for specialized knowledge and skills which it does not possess. The determination of the proper way in which to prepare members of the National Guard for the performance of their military duties must be made by the military. Moreover, judicial prescription, through the use of injunctive powers, of the manner in which the Guard should deal with civilian disorders is singularly inappropriate. The military authorities should not be placed within the constraint of a judicial order telling them how to operate in the midst of the stress, confusion, and unexpected crises which characterize civil disturbances.

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2. Respondents have not shown "a personal stake in the outcome of the controversy." *Baker* v. *Carr*, 369 U.S. 186, 204. Respondents claim that the "rules, procedures and operating methods followed by the Ohio National Guard" (Br. 2) subject them to a continuing threat of future deprivations of their constitutional rights. But their claim of future harm is wholly speculative. The May 1970 shootings at Kent State, tragic as they were, do not by themselves justify fears of a recurrence of such incidents. Moreover, since that time there have been substantial revisions in the rules employed by the Guard with respect to the use of force in civil disorders, and these revisions eliminate the source of much of respondents' expressed concern for the future. Furthermore, respondents' suggestion that the practices and policies of the Guard intimidate them in the exercise of their First Amendment rights has no objective basis. Accordingly, respondents fail to show "specific present objective harm or a threat of specific future harm * * * [and therefore] * * * on this record the respondents have not presented a case for resolution by the courts." *Laird* v. *Tatum*, 408 U.S. 1, 14–15.

ARGUMENT

I. INTRODUCTION: THE STATUTORY AND REGULATORY CONTEXT

The pertinent federal and state statutes and regulations are of crucial importance, and we discuss them below in detail, since in our view they deserve more emphasis than has been given them by the court below, and by the parties and *amici* here in their briefs.

In order that the full setting may be before the Court, we will first describe the constitutional basis for the National Guard system and the pertinent statutes, federal and state, which provide the basic structure for the system. We then discuss the federal government's responsibility for training the National Guard, and, in particular, the training that guardsmen receive for civil disturbance control duty. Finally, in connection with the Guard's civil disturbance control responsibilities, we explain the rules observed by the Army and the Ohio National Guard with respect to the use of force.

A. THE NATIONAL GUARD

The Army National Guard and Air Force National Guard are the "Militia" referred to in Article I, Section 8, clauses 15 and 16 of the Constitution:

> The Congress shall have Power * * *
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress; * * *.

In first exercising the militia power, Congress prescribed only the organization and discipline of the militia; subsequently, it also supplied arms and equip-

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ment.[1] Since the beginning of this century, when the term "National Guard" came into use, Congress has also provided funds for the compensation of militia members. The basic structure of the National Guard as it is known today was established by the National Defense Act of 1916, 39 Stat. 166, *et seq.*, as amended, now 32 U.S.C. 101, *et seq.*

The 1916 Act embodied a fundamental decision to use the organized State militia, rather than a standing army or national force of volunteer reserves, as a basic source of reserve military strength. H. Rep. No. 297, 64th Cong., 1st Sess., pp. 2–9, 14 (1916). Congress not only provided for the arming, organization and discipline of the National Guard, but authorized the use of federal funds for the compensation of its offi-

[1] For a comprehensive discussion of the origins of the National Guard, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940). In the late Eighteenth century the militia was "a home-defense force, composed of most able-bodied men." Wiener, *supra*, 54 Harv. L. Rev. at 182. Most of the nation's military problems during the late Eighteenth and early Nineteenth centuries were dealt with by the militia and not by a standing army. During this time, however, the deficiencies of the militia became notorious—for example, many militiamen refused to fight outside their own state—and an expansion of the regular army gradually took place. The first modern institutional reforms were introduced by the Army Reorganization Act of 1901, 31 Stat. 748, which established a regular army "suited to the requirements of the United States as a world power" (54 Harv. L. Rev. at 193), and the Dick Act of 1903, 32 Stat. 775, which "provided for an Organized Militia, to be known as the National Guard, which should conform to the Regular Army organization, be equipped through federal funds, and be trained by Regular Army instructors" (54 Harv. L. Rev. at 195).

cers if members of the Guard units and their officers met federally-prescribed standards. See, *e.g.*, 53 Cong. Rec. 4356.

The 1916 Act contemplated that the National Guard would be both a state militia under the command and direction of the state except when called into federal service, and a reserve component of the national armed forces which, when ordered into active federal service, would constitute an integral part of the nation's regular military force. The Act made it clear that the states are to retain command and operational control over the National Guard when it is not in active federal service, and that the state retains its traditional power to use its militia "within the jurisdiction concerned, as its chief executive * * * considers necessary * * *." 32 U.S.C. 109(c).

Despite the large measure of autonomy which Congress gave the states, the Act provided that Guard units could qualify for federal financial support only if they maintained "federal recognition" by participating in federally-prescribed drills and training and by passing inspections designed to assure that their members, organizations, training, instruction and property meet prescribed federal standards. 32 U.S.C. 105, 108, 502. The Act empowered the President to "prescribe regulations, and issue orders, necessary to organize, discipline, and govern the National Guard." 32 U.S.C. 110.

The laws of Ohio illustrate the dual function which the National Guard performs. The state recognizes that its militia is an integral part of the nation's

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overall military program; state law provides that "[t]he military laws of this state shall conform to all laws and regulations of the United States affecting the same subject and anything to the contrary shall be void so long as the subject matter has been acted on by the United States." Ohio Revised Code, § 5923.28 (1971 Supp.). On the other hand, the state also provides that the militia is to exercise its traditional role as a residual state police force which can be used in times of emergency or exceptional stress to aid in quelling civil disturbances. State law provides that "[t]he organized militia may be ordered by the governor to aid the civil authorities to suppress or prevent riot or insurrection * * *." Ohio Revised Code, § 5923.21. See, also, Ohio Revised Code, §§ 5923.22, 5923.1 (1971 Supp.).

B. THE ROLE OF THE FEDERAL GOVERNMENT IN TRAINING THE ARMY NATIONAL GUARD

Article I, Section 8, cl. 16 of the Constitution gives Congress the power to provide for "organizing, arming, and disciplining, the Militia" and reserves to the states "the Authority of training the militia according to the discipline prescribed by Congress." The congressional prescription of a uniform training regimen, or discipline, ensures that—should the need arise—the militia can be effectively integrated into the regular Army. But while the Constitution contemplates that the federal government will prescribe the training program, the state, as long as the Guard has not been federalized, actually administers the training.

In prescribing the training of the National Guard, the Army naturally is primarily concerned with insuring that the Guard is qualified to serve as part of the Army if called to active federal duty. But the Army has also promulgated detailed instructions for civil disturbance control training.[2] This training program is for National Guardsmen as well as members of the regular Army.

Members of the Army National Guard receive training at three stages of their enlistment—an initial tour of active duty in the Army; throughout their period of service in their National Guard units; and at summer encampments.

Initially, a person without prior military service who enlists in the National Guard must serve on active duty with the regular Army for a minimum of four months. 10 U.S.C. 511(d). During this period, the guardsman receives his Basic Combat Training ("BCT") and Advanced Individual Training ("AIT"), both of which are taken with regular Army recruits. The guardsman's training at this stage of his enlistment is governed by regular Army regulations and administered by regular Army personnel.

Prior to 1971, this initial training was the same for both regular Army and National Guard recruits. In that year, however, the Army began to give National Guard recruits 16 hours of additional special civil disturbance control training. This special training was initiated in recognition of the fact that Guard units

[2] See Army Subject Schedule 19–6, "Control of Civil Disturbances," dated August 9, 1972, a copy of which has been lodged with the Court.

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are more likely to be called to suppress civil disturbances than are regular Army units.[3]

Individuals with prior military service may enter the National Guard without undergoing the active duty required of enlistees without prior service. 10 U.S.C. 510(b)(2). If such persons completed their regular service without having received civil disturbance training, Army regulations require that they receive eight hours of individual civil disturbance training before they participate in the National Guard's own training program.[4]

Most of the training a guardsman receives after his integration into a National Guard unit is conducted by Guard personnel. While each unit of the National Guard must assemble for drill and instruction at least 48 times a year (32 U.S.C. 502(a)(1)) and may not receive credit for a drill unless "the training is of the type prescribed by the Secretary concerned" (32 U.S.C. 502(d)(3)), the basic decisions with respect to allocation of training times are made by the State Adjutants General. Thus, for example, the Army requires that whenever a National Guard unit is assigned a new civil disturbance mission, it must use the earliest available weekend drills to conduct civil disturbance training; similarly, all units with civil disturbance missions are required to conduct annual

[3] See paragraph 3c, Appendix XXV, Aux F to "Reserve Enlistment Program of 1963," a copy of which has been lodged in the Court.

[4] Paragraph 4a, Appendix XV, Aux F to "Training in Civil Disturbance Control Operations," a copy of which has been lodged in the Court.

civil disturbance refresher training. In both cases, the training must follow federal standards. The commander of the unit, however, is given discretion, within certain limits, to vary the hours devoted to any particular subject (*e.g.*, riot control formations).[5]

Finally, guardsmen receive training during the summer encampments which all Guard units must participate in for at least 15 days each year. 32 U.S.C. 502(a)(2). Since the annual summer camp training is devoted primarily to maintaining the Guard's combat readiness for its national defense role, civil disturbance training is not conducted at such times unless specifically authorized by the Continental Army Command.[6]

C. RULES PERTAINING TO THE USE OF FORCE

Closely related to the civil disturbance control training which guardsmen receive are the "use of force" rules to which they are subject when in an operational or mobilized status. When the Guard is involved in civil disturbance control while in federal status, the Army's use-of-force rules govern. More frequently, the Guard is in state status when it is called on to perform civil disturbance control duties. In such circumstances it is subject to the state's use-of-force regulations. While the National Guards of all states, including Ohio, have now voluntarily adopted the federal standards as their own, the Ohio rules at the time

[5] See, *e.g.*, paragraphs 2a(2), 3a and 3b, Appendix XV Anx F to "Training in Civil Disturbance Control Operations," note 4, *supra*.

[6] See paragraph 3c, Appendix XV Anx F to "Training in Civil Disturbance Control Operations," note 4, *supra*.

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of the Kent State incident (*i.e.*, May 1970) were substantially different from the federal rules and quite different from what they are today.

1. Army Use-of-Force Rules

Since March 1968, Army rules have strictly limited the use of force in civil disturbance control operations to the minimum necessary to accomplish the mission.[7] The current rules, which are set forth in Appendix A, *infra*, pp. 29–40, provide detailed limitations on the use of deadly force. Such force is authorized only where (App. A, *infra*, p. 31):

> (1) Lesser means have been exhausted or are unavailable; and
>
> (2) The risk of death or serious bodily harm to innocent persons is not significantly increased by its use; and
>
> (3) The purpose of its use is one or more of the following:
>
> (a) Self-defense to avoid death or serious bodily harm * * *;
>
> (b) Prevention of a crime which involves a substantial risk of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons;
>
> (c) Prevention of the destruction of public utilities or similar property vital to public health or safety; or
>
> (d) Detention or prevention of the escape of persons who have committed or attempted

[7] See Field Manual 19–15, "Civil Disturbances and Disasters," dated March 25, 1968, a copy of which has been lodged in the Court.

to commit one of the serious offenses referred to in (a), (b), and (c) above.

The rules further provide with respect to the use of live ammunition (App. A, *infra*, pp. 32–33):

> Task force commanders are authorized to have live ammunition issued to personnel under their command. Individual soldiers will be instructed, however, that they may not load their weapons * * * except when authorized by an officer or, provided they are not under the direct control and supervision of an officer, when the circumstances would justify their use of deadly force * * *. Retention of control by an officer over the loading of weapons until such time as the need for such action is clearly established is of critical importance in preventing the unjustified use of deadly force. Whenever possible, command and control arrangements should be specifically designed to facilitate such careful control of deadly weapons.

The rules also provide several other safeguards relating to the use of force and the control of crowds. See generally App. A, *infra*, pp. 29–40.

2. Ohio Use-of-Force Rules

The use-of-force rules of the Ohio National Guard that were in effect during May 1970 differed substantially from those of the Army. See App. B, *infra*, pp. 41–45. The Ohio rules did state that only the minimum force necessary should be used. However, they further provided (App. B, *infra*, p. 44) that "[i]n any instance where human life is endangered by the force-

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ible, violent actions of a rioter, *or* when rioters to whom the Riot Act has been read cannot be dispersed by any other reasonable means, then shooting is justified" (emphasis added). Furthermore, contrary to the Army rules, the Ohio directive specified that guardsmen were to carry loaded rifles. See App. B, *infra*, p. 43.

In December 1970, following the shootings at Kent State, the Ohio National Guard issued a new operations plan which adopted the Army use-of-force rules verbatim.[8]

II. RESPONDENTS' CLAIM—THAT THE TRAINING, WEAPONS, AND ORDERS OF THE OHIO NATIONAL GUARD DEPRIVE OR THREATEN TO DEPRIVE THEM OF CONSTITUTIONAL RIGHTS—IS NOT JUSTICIABLE

Respondents seek a judicial inquiry into and a judicial determination of the adequacy of the current training practices and policies of the Ohio National Guard. For reasons which are discussed below (see pp. 20–28, *infra*), we believe that respondents do not have standing to litigate those issues. But we further believe that the kind of judicial involvement in and supervision of military affairs which respondents' complaint would require is beyond the proper sphere of judicial action.

[8] See Appendix 2 to Annex C to Oplan Act, a copy of which has been lodged in the Court. By directive dated June 28, 1972, a copy of which has also been lodged in the Court, the Ohio Adjutant General in effect incorporated all the amendments made to the Army rules up to that date and added further protective rules.

The court below construed respondents' complaint as alleging that the training, weapons, and orders of the Ohio National Guard "make inevitable the use of [unnecessary] fatal force in suppressing civilian disorders * * *" (italics omitted; Pet. App. 18). The court assumed that appropriate injunctive relief could be fashioned if respondents' claims were upheld. But the fashioning of any injunctive relief would require the district court itself to determine the training, weapons, and orders appropriate for civil disturbance control. This is not the kind of determination that courts are equipped to make or are expected to make under our system of allocation of governmental powers; it is a matter which requires the technical skills and information that the military authorities possess, and which they alone are qualified to decide.

The extent of judicial intervention in military affairs which would be likely to result if this suit could be maintained is illustrated by the relief which respondents request—that future use of the Ohio National Guard for the control of civil disturbances on the Kent State campus be enjoined until the Guard has been "competently trained in techniques of civilian disorder control, * * * provided with the best available non-lethal equipment for use in civilian disorder control, * * * instructed not to use deadly force except in the case of actual self-defense or upon persons who have actually used or threatened the use of deadly force and * * * ordered not to carry live ammunition loaded in their guns when engaged in such control of civilian disorders * * *" (App. 11). Respondents thus

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seek, and the court of appeals apparently has authorized, "a broad-scale investigation, conducted by [respondents] as private parties armed with the subpoena power of a federal district court and the power of cross-examination, to probe into the [National Guard's civil disturbance control techniques] * * * with the district court determining at the conclusion of that investigation the extent to which those [techniques] may or may not be appropriate * * *." *Laird* v. *Tatum,* 408 U.S. 1, 14. Such judicial control of the National Guard's training, weapons and orders constitutes a "forbidden judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern R. Co.,* 372 U.S. 658, 670.

Furthermore, the broad-scale investigation required by respondents' complaint, as construed by the court of appeals, lacks the specificity required for adjudication. Respondents challenge not merely particular rules or activities but the general propriety of the Guard's training, weapons, and orders with respect to civil disorders. Justiciability requires "that clear concreteness provided when a question emerges precisely framed and necessary for decision * * *." *United States* v. *Fruehauf,* 365 U.S. 146, 157. Respondents, however, seek the kind of comprehensive review appropriate to a legislative committee; this is a task for which the judiciary is ill-suited. The courts should not be asked to function "as virtually continuing monitors of the wisdom and soundness of Executive action * * *." *Laird* v. *Tatum, supra,* 408 U.S. at 15.

These considerations concerning the proper allocation of judicial and executive responsibilities are especially telling in the instant case. The inquiries in which respondents would involve the judiciary—such as whether the Ohio Guard has been "competently trained in techniques of civilian disorder control" and "provided with the best available nonlethal equipment for use in civilian disorder control"—call for the kind of specialized knowledge and skills that the judiciary does not possess. For example, what standards is the district court to apply in determining whether members of the Ohio National Guard have been "competently trained?" Is the court to attempt to evaluate the adequacy of the instruction, the caliber of the instructors, and the sufficiency of the examination and evaluation made upon completion of the training? Presumably the military authorities have selected what they consider "the best available" equipment for use in civilian disorder control; is the district court to make its own independent evaluation, on the basis of possibly conflicting expert testimony, whether there are other kinds or brands of equipment that would be better? Is the district court's role in this inquiry to be the traditional one of reviewing the propriety of administrative action—to determine whether it is arbitrary and capricious—or is the court expected to decide these questions *de novo,* as if it were the military authorities prescribing the Guard training? Either standard of inquiry would be inappropriate; the determination of the proper way in which to prepare members of the National Guard

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for the performance of their military duties must be made by the military. Cf. *McAbee* v. *Martinez*, 291 F. Supp. 77 (D. Md.). As this Court noted in *Orloff* v. *Willoughby*, 345 U.S. 83, 93–94:

> * * * [J]udges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Moreover, respondents seek not only judicial control of the training of the National Guard, but also judicial prescription of the precise way in which the Guard should operate when dealing with civilian disorders. Thus, respondents seek an injunction prohibiting the Guard from using "deadly force except in the case of actual self-defense or upon persons who have actually threatened the use of deadly force." That kind of an injunction, however, would be singularly inappropriate as a device for controlling the operations of the National Guard, and could result in the very kind of bloodshed and loss of life that the respondents apparently are seeking to prevent.

The determination whether to use force, in what circumstances and in what amount, can be made only in the light of the actual civilian disturbance as it exists, and not in advance in a theoretical context. The decisions with respect to the appropriate techniques to be employed to control civil disturbances must be made on the spot, in the light of the actual situation facing the troops, and with the benefit of the accumulated experience in dealing with this sensitive

problem that only the military authorities, and not the courts, can possibly possess.

The use of an injunction to control this aspect of the National Guard's activities would be particularly ill-advised. Commanders at the scene of a civil disorder might be reluctant to use their best military judgment with respect to what is the most suitable method of dealing with the situation if there was lurking in the background the possibility that a court subsequently would conclude that their actions went beyond what the injunction permits and therefore constituted contempt. The military authorities cannot properly perform their duties within the constraint of a judicial order telling them how to operate—an order necessarily made without knowledge of the specific facts with which the military will be confronted when they are called on to act. For the Guard to carry out its responsibility for maintaining civil order, it must retain operational flexibility. The occasions when plans to deal with civil disturbances must be put into effect are always full of stress and unpredictability. The authority to improvise or reformulate plans as necessity requires is essential in such circumstances. Judicially imposed limitations would seriously interfere with the Guard's ability to control disorders.

III. RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS SUIT

In order to have standing to challenge the propriety of current National Guard practices and

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policies, respondents must demonstrate "a personal stake in the outcome of the controversy." *Baker* v. *Carr,* 369 U.S. 186, 204.[9] There must be "a logical nexus between the status asserted and the claim sought to be adjudicated * * *" (*Flast* v. *Cohen,* 392 U.S. 83, 102), which can be established only by a showing of "specific present objective harm or a threat of specific future harm." *Laird* v. *Tatum,* 408 U.S. 1, 14. See, also, *Linda R. S.* v. *Richard D.,* No. 71–6078, decided March 5, 1973; *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 166–167; *Sierra Club* v. *Morton,* 405 U.S. 727, 731–732.

Respondents attempt to meet this requirement of "a personal stake" by alleging that as a consequence of the Guard's activities at Kent State during May 1970, they are presently intimidated from exercising their "rights of lawful assembly, speech and association" (Br. 3) and are threatened with future "deprivations of life and liberty without due process of law" (*ibid.*). But as we shall show, these putative injuries are remote and hypothetical; "on this record the respondents have not presented a case for resolution by the courts." *Laird* v. *Tatum, supra,* 408 U.S. at 15.

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[9] This requirement of "a personal stake" is not simply imposed as a device for exercising judicial restraint. The jurisdiction of Article III courts rests upon the existence of a genuine case or controversy, and standing is necessary to ensure "that concrete adverseness" (*Baker* v. *Carr, supra,* 369 U.S. at 204) which is the prerequisite of a case or controversy in the constitutional sense. See *Linda R. S.* v. *Richard D.,* No. 71–6078, decided March 5, 1973 (slip op., p. 3).

A. RESPONDENTS HAVE NOT IDENTIFIED A SUFFICIENT THREAT OF SPECIFIC FUTURE HARM TO JUSTIFY INVOKING THE JUDICIAL PROCESS

Respondents claim (Br. 22–26) that the "rules, procedures and operating methods followed by the Ohio National Guard" (Br. 2) subject them to a continuing threat of future deprivations of their constitutional rights. But their claim of future harm is wholly speculative. Respondents base their claim upon the single incident at Kent State in May 1970, and ignore the substantial revisions that have since been made in Guard policy which eliminate much of the source of their concern.

1. The single incident at Kent State in May 1970 does not pose a sufficient threat of repetition to warrant judicial intervention.

Whether respondents have standing to maintain this suit depends, in the first instance, not upon the seriousness but upon the likelihood of the asserted prospective injury. It is the imminence and probability of harm that provides the concreteness necessary to establish a case or controversy appropriate for judicial resolution. Cf. *Poe* v. *Ullman,* 367 U.S. 497. A litigant has no standing to complain about threatened injury that is remote or speculative. See *Ex parte Levitt,* 302 U.S. 633, 634.

We are not unmindful of those decisions cited by respondents which have indicated, following this Court's opinion in *Hague* v. *C.I.O.,* 307 U.S. 496, that courts may appropriately provide "injunctive or declaratory relief based on claims that police or

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other agencies of state or local government were engaging or had engaged in deprivations of constitutionally secured rights" (Br. 17). See, *e.g.*, *Lewis* v. *Kugler*, 446 F. 2d 1343 (C.A. 3); *Schnell* v. *City of Chicago*, 407 F. 2d 1084 (C.A. 7); *Gomez* v. *Layton*, 394 F. 2d 764 (C.A. D.C.). However, as the Second Circuit has pointed out, "[t]he very statement of [the facts] of these cases shows their inapplicability to a situation involving a single although grave failure by the police to discharge their responsibilities, followed by speedy criticism and the taking of corrective measures * * *." *Belknap* v. *Leary*, 427 F. 2d 496, 499 (C.A. 2).[10]

In *Hague* itself, city authorities had, over a long period of time, directed an active and pervasive program of harassment against the plaintiffs, and had

[10] *Belknap* was an action under 42 U.S.C. 1983 to restrain New York City police from failing to accord anti-war protesters protection against physical assaults by counter-protesters at future demonstrations. Plaintiffs pointed to one previous demonstration where authorities were allegedly negligent in failing to protect them from such assaults. The court contrasted this single dereliction by police, which it concluded was an inadequate basis to justify injunctive relief, with the facts in cases like *Cottonreader* v. *Johnson*, 252 F. Supp. 492 (M.D. Ala.) and *Lankford* v. *Gelston*, 364 F. 2d 197 (C.A. 4), upon both of which respondents rely. The court noted (427 F. 2d at 499) that in *Cottonreader* "the defendants, including the Mayor and Chief of Police, over a period of months had themselves intimidated and harassed the plaintiffs as well as permitting other citizens to intimidate, threaten and assault them," and that *Lankford* involved "an instance of large scale police violation of the Fourth Amendment which * * * 'on a smaller scale has routinely attended efforts to apprehend persons accused of serious crime'" (*ibid.*).

expressed their intent to continue such activities indefinitely. In the present case, on the other hand, there is no allegation of a continuing policy and practice of interfering with the exercise and enjoyment of constitutional rights. Standing is predicated solely upon a single, although momentous, tragic incident. But that event, by itself, does not pose a sufficient "threat of specific future harm." [11]

Since respondents' claim of future injury is wholly speculative, even as students at Kent State they have no greater standing to challenge the propriety of current National Guard training, weapons, and orders than do any other residents of Ohio. And mere status as a resident does not confer standing to sue. Cf. *Tileston* v. *Ullman*, 318 U.S. 44.[12]

2. Respondents have no standing for the further reason that the National Guard practices and policies on which their case is based no longer exist

In *Belknap* v. *Leary*, *supra*, the Second Circuit, in addition to pointing out that only a single incident of

[11] Respondents' allegation of past injury does not confer standing here. This case does not involve an inquiry into the adequacy of the training or the propriety of the weapons and orders of the National Guard units involved in the shootings at Kent State. Cf. *Scheuer* v. *Rhodes*, petition for a writ of certiorari pending, No. 72-914. Respondents instead seek an investigation into current practices and policies and request prospective relief. Past injury is irrelevant to a "personal stake" in the granting of prospective relief, in the absence of a showing that recurrence of the injury is likely.

[12] Respondents do not allege standing as taxpayers, but since this case does not involve the spending power such an allegation would in any event be unavailing. *Flast* v. *Cohen*, 392 U.S. 83.

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unlawful police action had been alleged, emphasized (427 F. 2d at 499) that corrective measures were taken by the city shortly after the incident giving rise to the litigation occurred. Similarly, in *Laird* v. *Tatum, supra,* this Court noted (408 U.S. at 8) that "the Army's review of the needs of its domestic intelligence activities has indeed been a continuing one and * * * those activities have since been significantly reduced." Thus in both cases the existence of recently introduced corrective measures was a significant factor supporting the conclusion that judicial intervention was unwarranted.

In this case, also, there have been significant changes in official policies and practices (see pp. 12–15 *supra*), and these changes further illustrate the speculative nature of respondents' allegations of future harm. For example, respondents assert (Br. 4):

> The conditions alleged to be casually related to the deprivations include failure adequately to provide Ohio National Guard troops with specialized civil disorder training or with adequate equipment to respond to civilian disorders with non-deadly force, causing troops to carry live bullets in their guns and failing to properly instruct troops as to the legal limits on their use of deadly force.

According to respondents (Br. 2–3), because there has been "a continuation of the same rules, procedures and operating methods followed by the Ohio National Guard, [there is] * * * a substantial threat of repetition of similar acts * * * [in the future]." Respondents, however, ignore the substantial changes

that have been made in the policies and practices that they condemn.

As indicated above (p. 10, *supra*), mandatory "specialized civil disorder training" has since 1971 been required for all new National Guard enlistees; the training is given by regular Army personnel while the guardsman is serving his initial tour of active duty. This training includes separate instruction in such subjects as "stress training," "campus and open area operation," "riot control agents and munitions," and "individual responsibilities and standards of conduct." [13] After his initial training, the guardsman receives regular refresher courses in civilian disorder training. See pp. 11–12, *supra*.

Respondents have stressed the Ohio National Guard's policies with respect to the use of force. But this is the area where the most dramatic changes in state policy have occurred. At the time of the Kent State shootings, the Ohio National Guard's operations plan provided that "when rioters to whom the Riot Act has been read cannot be dispersed by any other reasonable means, then shooting is justified," and that during riot control duty "[r]ifles will be carried with a round in the chamber in a safe position." See p. 15, *supra*. Neither of these directives is in effect today. As we have shown (p. 15, *supra*), Ohio has adopted verbatim the regular Army's use-of-force rules, which prohibit the carrying of loaded weapons and carefully delineate and restrict the situations where use of deadly force may be employed.

[13] See Army Subject Schedule 19–6, note 2, *supra*.

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In view of these changes in state practice and policy, there is no basis for any substantial claim that the conditions that gave rise to the Kent State shootings are likely to be repeated. For this reason respondents' claim lacks the adverseness and immediacy that is necessary before courts may properly act.

B. RESPONDENTS' SUGGESTION OF A "CHILLING" EFFECT ON THEIR FIRST AMENDMENT RIGHTS IS INSUBSTANTIAL

Respondents suggest that they are presently suffering injury because the practices and policies of the Ohio National Guard intimidate them in the exercise of their First Amendment rights.[14] This "chilling"-effect argument typically is made where, as in *Laird* v. *Tatum, supra,* the executive activity allegedly giving rise to the putative chill is ongoing and not merely potential. Here, of course, there is no ongoing event or program which respondents will inevitably confront; they allege merely that such an event (*i.e.,* the recalling of the National Guard to the Kent State campus) may occur at some unspecified time in the future. Thus any "chilling" effect stems only from present fears of uncertain harm at some indefinite time in the future. Since, as we have shown, respondents cannot show a threat of specific future harm here, *a fortiori* any claim of present First Amendment deprivation must fall as well.

This case has strong overtones because it arises out of a great national tragedy. It involves, however, an area which is particularly inappropriate for judicial

[14] While respondents do not here expressly assert a "chilling" effect, that claim appears to be implicit in their contentions when viewed as a whole. See, *e.g.*, App. 6; Br. 2–3.

supervision and control: the operations of the military. It is our position that courts should not intervene in this sensitive area unless the plaintiffs have clearly shown that they are likely to undergo specific injury from the practices they challenge. Cf *Laird* v. *Tatum, supra.* The respondents have not made such a showing.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, with directions that the complaint be dismissed.

Respectfully submitted.

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APPENDIX A

Paragraphs 4–11, 4–12, and 5–9 of Army Field Manual 19–15, "Civil Disturbances," dated March 22, 1972, provide:

4–11. General.

a. Operations by Federal forces will not be authorized until the President is advised by the highest officials of the State that the situation cannot be controlled with the non-Federal resources available. The task force commander's mission is to help restore law and order and to help maintain it until such time as State and local forces can control the situation without Federal assistance. In performing this mission, the task force commander may find it necessary to participate actively not only in quelling the disturbance but also in helping to detain those responsible for it. Task force commanders are authorized and directed to provide such active participation, subject to the restraints on the use of force set forth herein.

b. The primary rule which governs the actions of Federal forces in assisting State and local authorities to restore law and order is that a task force commander must at all times use only the minimum force required to accomplish his mission. This paramount principle should control both the selection of appropriate operational techniques and tactics and the choice of options for arming the troops (para 5–9). Pursuant to this principle, the use of deadly force; i.e., live ammunition or any other type of physical force likely to cause death or serious bodily harm, is authorized only under extreme circumstances where

certain specific criteria are met (para 4–12*b*). To emphasize limitations on use of firepower and to restrict automatic fire, commanders will insure that rifles with only a safe or semiautomatic selection capability, or rifles modified to have only a safe or semiautomatic selection capability, will be used as the basic weapon for troops in a civil disturbance area.

c. All personnel, prior to participation in civil disturbance operations, will be briefed as to—

(1) The specific mission of the unit.

(2) Rules governing the application of force as they apply to the specific situation.

(3) A psychological orientation on the local situation, specifically addressing types of abuse which military personnel may be expected to receive and the proper response to these types of abuse.

4–12. Use of Nondeadly and Deadly Force.

a. Task force commanders are authorized to use nondeadly force to control the disturbance, to prevent crimes, and to apprehend or detain persons who have committed crimes; but the degree of force used must be no greater than that reasonably necessary under the circumstances. The use of deadly force, however, in effect invokes the power of summary execution and can therefore be justified only by extreme necessity. Accordingly, its use is not authorized for the purpose of preventing activities which do not pose a significant risk of death or serious bodily harm (e.g., curfew violations or looting). If a mission cannot be accomplished without the use of deadly force, but deadly force is not permitted under the guidelines authorizing its use, accomplishment of the mission must be delayed until sufficient nondeadly force can be brought to bear. The commander should report the situation and seek instructions from higher au-

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thority. All the requirements of *b*, below, must be met in every case in which deadly force is employed.

b. The use of deadly force is authorized only where all three of the following circumstances are present:

(1) Lesser means have been exhausted or are unavailable; and

(2) The risk of death or serious bodily harm to innocent persons is not significantly increased by its use; and

(3) The purpose of its use is one or more of the following:

(*a*) Self-defense to avoid death or serious bodily harm (*c*, below);

(*b*) Prevention of a crime which involves a substantial risk of death or serious bodily harm (for example, setting fire to an inhabited dwelling or sniping), including the defense of other persons;

(*c*) Prevention of the destruction of public utilities or similar property vital to public health or safety; or

(*d*) Detention or prevention of the escape of persons who have committed or attempted to commit one of the serious offenses referred to in (*a*), (*b*), and (*c*) above.

c. Every soldier has the right under the law to use reasonably necessary force to defend himself against violent and dangerous personal attack. The limitations described in this paragraph are not intended to infringe this right but to prevent the unauthorized or indiscriminate firing of weapons and the unauthorized or indiscriminate use of other types of deadly force.

d. In addition, the following policies regarding the use of deadly force will be observed:

(1) When firing ammunition, the marksman should, if possible, aim to wound rather than to kill.

(2) When possible, the use of deadly force should be preceded by a clear warning to the individual or group that use of such force is contemplated or imminent.

(3) Warning shots are not to be employed. Such firing constitutes a hazard to innocent persons and can create the mistaken impression on the part of citizens or fellow law enforcement personnel that sniping is widespread.

(4) Even when its use is authorized pursuant to *b*, above, deadly force must be employed only with great selectivity and precision against the particular threat which justifies its use. For example, the receipt of sniper fire—however deadly—from an unknown location can never justify "returning the fire" against any or all persons who may be visible on the street or in nearby buildings. Such an indiscriminate response is far too likely to result in casualties among innocent bystanders or fellow law enforcement personnel; the appropriate response is to take cover and attempt to locate the source of the fire so that the threat can be neutralized in accordance with *e*, below.

e. Task force commanders are authorized to have live ammunition issued to personnel under their command. Individual soldiers will be instructed, however, that they may not load their weapons (place a round in the chamber) except when authorized by an officer or, provided they are not under the direct control and supervision of an officer, when the circumstances would justify their use of deadly force pursuant to *b*, above. Retention of control by an officer over the loading of weapons until such time as the need for such action is clearly established is of critical importance in preventing the unjustified use of deadly force. Whenever possible, command and control arrangements

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should be specifically designed to facilitate such careful control of deadly weapons.

f. The presence of loaded weapons in tense situations may invite the application of deadly force in response to provocations which while subject to censure, are not sufficient to justify its use; and it increases the hazard that the improper discharge of a weapon by one or more individuals will lead others to a reflex response on the mistaken assumption that an order to fire has been given. Officers should be clearly instructed, therefore, that they have a personal obligation to withhold permission for loading until circumstances indicate a high probability that deadly force will be imminently necessary and justified pursuant to the criteria set forth in *b*, above. Strong command supervision must be exercised to assure that the loading of weapons is not authorized in a routine, premature, or blanket manner.

g. Task force commanders should at all times exercise positive control over the use of weapons. The individual soldier will be instructed that he may not fire his weapon except when authorized by an officer, or provided he is not under the direct control and supervision of an officer, when the circumstances would justify his use of deadly force pursuant to *b*, above. He must not only be thoroughly acquainted with the prerequisites for the use of deadly force, therefore, but he must also realize that whenever his unit is operating under the immediate command and control of an officer, that commander will determine whether the firing of live ammunition is necessary.

h. Task force commanders may at their discretion delegate the authority to authorize the use of deadly force, provided that such delegation is not inconsistent with this paragraph and that the person to whom such

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delegation is made understands the constraints upon the use of deadly force set forth in *b*, above.

* * * * *

5–9. Techniques for Crowd Control.

There are numerous techniques designed to provide the commander with flexibility of action in accomplishing crowd control. He must select a combination of techniques which will produce the desired results within the framework of the selected crowd control option. The most common techniques appropriate for military usage are discussed below:

a. Observation. This consists of the deployment of individuals or teams to the periphery of a crowd for the purpose of monitoring its activity. It includes gathering information on crowd size, location, mood, and reporting on the developing situation. This technique includes posting individuals on strategic rooftops and other high terrain overlooking the crowd. This latter measure provides additional security to control force personnel should they be committed to other crowd control operations. Such a team may be composed of an expert marksman, a radio operator, and an observer equipped with binoculars. Care must be taken to assure that committed control forces are aware of the locations of such teams to preclude their being mistaken for sniper elements.

b. Communication of Interest and Intent. In certain situations effective communication with crowd and mob leaders and participants may enable the commander to control the situation without resort to more severe actions. When planned and organized demonstrations, marches or rallies within the disturbed area are announced, the control force commander in coordination with local authorities should meet with organizers of the activity in order to communicate the

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interest of the control forces. The following matters, as appropriate, should be discussed:

(1) Parade or demonstration permits.

(2) Location of demonstration and routes of march.

(3) Time limits for the activity.

(4) Provision of marshals by activity organizers.

(5) Prevention of violence.

(6) Safety of all concerned.

The task force commander and local authorities should also communicate to the activity organizers their intent to cope with violence, unlawful actions and violations of restrictions imposed on the activity. It is intended that, by this communication between activity organizers and control force personnel, the demonstration, rally or parade will occur without incident through the mutual cooperation of all concerned. The intentions of control forces will not be effective if delivered as an ultimatum. A limited, begrudging dialogue with activity organizers reduces the opportunity for authorities to learn the plans of the demonstrators. It must be remembered that, if this communication is not effected, the activity organizers might well hold the demonstration in defiance of local authorities, thereby creating a potential for violence that might not have existed if this technique had been employed.

c. Selection of Force Options.

(1) The commitment of Federal military forces must be viewed as a drastic last resort. Their role, therefore, should never be greater than is absolutely necessary under the particular circumstances which prevail. This does not mean, however, that the number of troops employed should be minimized. To the contrary, the degree of force required to control a disturbance is frequently inversely proportionate to the number of available personnel. Doubts concerning the

number of troops required, therefore, should normally be resolved in favor of large numbers since the presence of such large numbers may prevent the development of situations in which the use of deadly force is necessary. A large reserve of troops should be maintained during civil disturbance operations. The knowledge that a large reserve force is available builds morale among military and law enforcement personnel and contributes toward preventing overreaction to provocative acts by disorderly persons.

(2) In selecting an operational approach to a civil disturbance situation, the commander and his staff must adhere scrupulously to the "minimum necessary force" principle; for example, riot control formations or riot control agents should not be used if saturation of the area with manpower would suffice.

(3) Every effort should be made to avoid appearing as an alien invading force and to present the image of a restrained and well-disciplined force whose sole purpose is to assist in restoration of law and order with a minimum loss of life and property and due respect for those citizens whose involvement may be purely accidental. Further, while riot control personnel should be visible, *tactics or force concentrations which might tend to excite rather than to calm should be avoided where possible.*

(4) The measures described in (*a*) through (*g*), below, may be applied in any order as deemed appropriate by the responsible commander so long as their application is consonant with paragraph 4–12, and otherwise in keeping with the situation as it exists.

(*a*) *Proclamation.* A public proclamation is considered an excellent medium to make known to a crowd the intentions of the control force commander. In some instances, such a proclamation makes further action unnecessary. A proclamation puts the popula-

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tion on notice that the situation demands extraordinary military measures, prepares the people to accept military presence, tends to inspire respect from lawless elements and supports law-abiding elements, gives psychological aid to the military forces attempting to restore order, and indicates to all concerned the gravity with which the situation is viewed.

(*b*) *Show of force.* A show of force is effective in various situations in civil disturbance control operations. When a crowd has assembled in an area, marching a well-equipped, highly-disciplined control force into view may be all the force that is needed to persuade them to disperse and retire peaceably to their homes. When persons are scattered throughout the disturbance area in small groups, a show of force may take the form of motor marches of troops throughout the area, saturation patrolling, and the manning of static posts, or similar measures.

(*c*) *Employment of riot control formations.* Riot control formations are used to disperse massed mobs which do not react to orders of the control force instructing them to disperse and retire peaceably to their homes. The employment of such formations is part of the show of force and has a strong psychological effect on any crowd. While the use of fixed bayonets can add considerably to this effect, the danger of intentional or accidental injury to nonviolent participants or fellow law enforcement personnel precludes such use in situations where troops are in contact with a nonviolent crowd.

(*d*) *Employment of water.* Water from a firehose may be effective in moving small groups on a narrow front such as a street or in defending a barricade or roadblock. Personnel applying water should be protected by riflemen and in some instances by shields.

In the use of water, the factors discussed below should be considered.

1. Water may be employed as a flat trajectory weapon utilizing pressure, or as a high trajectory weapon employing water as rainfall. The latter is highly effective during cold weather.

2. The use of a large water tank (750 to 1,000 gallons) and a powerful water pump mounted on a truck with a high pressure hose and nozzle capable of searching and traversing will enable troops to employ water as they advance. By having at least two such water trucks, one can be held in reserve for use when required.

3. In using water, as with other measures of force, certain restraints must be applied. Using water on innocent bystanders such as women and children should be avoided; avenues of escape must be provided; and the more severe use, flat trajectory application, should be used only when necessary.

4. Since the fire departments normally are associated with lifesaving practices rather than maintenance of law and order, consideration should be given to maintaining this image of the fire departments through the use of other than fire department equipment when using water for riot control and crowd dispersal.

(*e*) *Employment of riot control agents.* Riot control agents are extremely useful in civil disturbance control operations because they offer a humane and effective method of reducing resistance and lessen the requirements for the application of more severe measures of force. Task force commanders are authorized to delegate the authority to use riot control agents and other forms of nondeadly force at their discretion.

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(*f*) *Fire by selected marksmen.* Fire by selected marksmen may be necessary under certain circumstances. Marksmen should be preselected and designated in each squad. Selected marksmen should be specifically trained and thoroughly instructed. They may be placed on vehicles, in buildings, or elsewhere as required.

(*g*) *Full firepower.* The most severe measure of force that can be applied by troops is that of available unit firepower with the intent of producing extensive casualties. This extreme measure would be used as a last resort only after all other measures have failed or obviously would be impractical, and the consequence of failure to completey subdue the riot would be imminent overthrow of the government, continued mass casualties, or similar grievous conditions. It has never been used by Federal troops in this century. See primary rule for use of force and restriction on use of automatic fire in paragraph 4–11*b*.

(5) The normal reflex action of the well-trained combat soldier to sniper fire is to respond with an overwhelming mass of fire power. In a civil disturbance situation, this tactic endangers innocent people more than snipers. The preferred tactic is to enter the building from which the fire originates. Darkening the street in order to gain protection from sniper fire is counterproductive. The following general approach should be emphasized in dealing with snipers:

(*a*) Surround the building in which the sniper is concealed and gain access, using armored vehicles if necessary and available.

(*b*) Illuminate the area during darkness.

(*c*) Employ agent CS initially, if feasible, rather than small arms fire. If CS is not successful, then use well-aimed fire by expert marksmen. The number

of rounds should be kept to a minimum to reduce the hazard to innocent persons.

(6) Consistent with the controlling principle that he must use only the minimum force necessary to accomplish his mission, the commander may select any one of the following options for arming his troops:

Rifle[3][4]	Bayonet scabbard	Bayonet	Ammunition magazine clip	Chamber
At sling	On belt	In scabbard	In pouch or belt	Empty.
At port	On belt	In scabbard	In pouch or belt	Empty.
At port	On belt	Fixed [1]	In pouch or belt	Empty.
At port	On belt	Fixed [1]	In weapon [2]	Empty.
At port	On belt	Fixed [1]	In weapon [2]	Round Chambered.

[1] See (4)(c) above.
[2] See paragraph 4–12f and g.
Rifles, if capable of automatic fire, must be modified to prevent automatic operation.
Troops may be armed with riot baton in lieu of rifles.

While each of the above options represents an escalation in the level of force, they are not sequential in the sense that a commander must initially select the first option, or proceed from one to another in any particular order. So long as the option selected is appropriate considering the existing threat, the minimum necessary force principle is not violated.

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APPENDIX B

As of May 1970, Ohio use-of-force rules, Annex F to OPLAN 2, provided:

1. Purpose: To provide commanders with information which must be disseminated to National Guard troops engaged in civil disturbances immediately prior to their employment. The information contained in paragraph 4 through 8 of this Annex will be read verbatim to troops by an officer of the unit.

2. Situation Briefing: In each instance when National Guard troops are to be employed, the commander will advise all troops of the following:

a. General situation.

b. Units to be employed and the command structure.

c. Passes, badges or other identification means to be honored permitting non-military personnel in the area.

d. Officers and key NCO's will maintain a record (by journal, log or diary) of orders or directives received and issued, resulting actions and any unusual incidents. Entries should include time, date and names.

3. Mission: The commander will state the mission of the organization and the portion for which his unit is responsible or the manner in which the company will be employed in carrying out the overall mission.

4. Individual Responsibility: As a member of this unit and the Ohio National Guard, you have a most serious and demanding individual responsibility. You are about to serve on one of the most difficult and unpleasant tasks that a soldier may be assigned. Re-

gardless of the actions and taunts of the rioters, you must remain the well-disciplined soldier. In short, you must look like a soldier, act like a soldier and remain fair and impartial under all circumstances.

5. Relationship With Civil Population: Our purpose is to restore and preserve peace among fellow citizens most of whom are friendly, but who will tolerate military control only to the extent necessary as the result of this emergency. When you display fairness and impartiality, scrupulously protect life and property, and exercise soldierly restraint under all conditions, you merit the respect and secure the cooperation of the civilian population. The temptation to use high handed methods may be great, but you must remain calm and retain your good judgment in order that you may act wisely regardless of personal feelings or beliefs. Do not fraternize with civilians or discuss with them at any time the circumstances of the military action.

6. Rules of Engagement: In any action that you are required to take, use only the minimum force necessary. When the Riot Act has been read within hearing, it is unlawful for any group of three or more people to remain unlawfully or riotously assembled and you may use necessary and proper means to disperse or apprehend them. Keeping groups from assembling prevents crowds which may become unruly and take mob action. Your use of force should be in the sequence listed below:

a. Issue a military request to disperse.

(1) Insure that an avenue of dispersal is available.

(2) Allow ample time for them to obey the order.

(3) Remain in area for sufficient time to prevent re-assembly.

b. Riot formations—show of force. Instructions in 6.a. (1) (2) (3) above apply.

c. Simple physical force, if feasible.

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d. Rifle butt and bayonet: If people do not respond to request, direction and order, and if simple physical force is not feasible, you have the rifle butt and bayonet which may be used in that order, using only such force as is necessary.

e. Chemicals. If people fail to respond to requests or orders, and riot formation and rifle butts or bayonets prove ineffective, chemicals (baseball grenades or jumping grenades) will be used on order when available. When large demands for chemicals are required a chemical squad will be dispatched to assist you upon request.

f. Weapons. When all other means have failed or chemicals are not readily available, you are armed with the rifle and have been issued live ammunition. The following rules apply in the use of firearms:

(1) Rifles will be carried with a round in the chamber in the safe position. Exercise care and be safety minded at all times.

(2) Indiscriminate firing of weapons is forbidden. Only single aimed shot at confirmed targets will be employed. Potential targets are:

(a) *Sniper*—(Determined by his firing upon, or in the direction of friendly forces or civilians) will be fired upon when clearly observed and it is determined that an attempt to apprehend would be hazardous or other means of neutralization are impractical.

(b) *Arsonist*—(Determined by acts of fire-setting of *inhabited* building or structure) will be fired on if there is apparent necessity and all other means of preventing the crime are first exhausted. That is, the arsonist on being ordered to halt during an attempt to apprehend, and failure to obey such order, where there is no other reasonable alternative, to prevent the escape of a felon from the scene of his felony.

(c) *Other*—In any instance where human life is endangered by the forcible, violent actions of a rioter, or when rioters to whom the Riot Act has been read cannot be dispersed by any other reasonable means, then shooting is justified.

(3) Full automatic weapons such as machine guns will be employed in riot control operations for their psychological effect. Such weapons will *not* be carried with a round in the chamber, but will be in a safe or half load position.

(4) When chemicals are employed and/or weapons fired, the report form issued to you with your ammunition will be completed and immediately brought to the company headquarters or reported by radio or telephone to me.

(Phone Nos. Unit Commanders)

g. Looters. Looters will be apprehended by using the minimum force necessary. Firing at looters will be undertaken only when directed by competent authority (i.e. when properly directed thru the entire chain of command).

7. Miscellaneous:

a. You will follow commands and orders of military commanders only—never those of civilian or police authorities.

b. Individual soldiers will not discuss operations with newsmen or others but refer them to an officer who will then direct them to the appropriate information source.

c. Actual search of persons, vehicles or buildings will be conducted by civilian police unless an *emergency* exists.

d. All law violators who are apprehended will be turned over to civil authorities.

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e. The following items will be particularly stressed in all preemployment briefings:

(1) *No* individual passes will be issued to troops during the civil disturbance operation.

(2) Personnel will not be permitted in bars or similar establishments except in the *most strict* sense of line of duty.

(3) Loaded weapons will not be carried into any commercial establishments except when specifically committed to the civil disturbance mission.

8. Summary:

a. The Riot Act has been read within hearing in the City of _____. You are here to restore law and order. The civilian population will judge you and the entire National Guard on your appearance and conduct. Act as a soldier and you will be obeyed. If force is necessary, use only that force which is necessary.

b. If there is absolute or apparent necessity and all other means of preventing the crimes of murder (such as sniper fire), robbery burglary, rape or arson (fire bombing of inhabited building or structure) have been exhausted, then life may be taken to prevent these forcible and atrocious crimes.

c. When the Riot Act has been read within hearing and you are engaged in dispersing or apprehending rioters, using necessary and proper means, then you are declared by Ohio Statute (RC 3761.15) to be guiltless if any of the persons unlawfully or violently assembled is killed, maimed or otherwise injured in consequence of resisting.

d. Use common sense and do only what is necessary to do and can be justified *afterwards.* Obey your orders! This is duty in time of public danger, which gives courts-martial full active duty punishing authority.

U.S. GOVERNMENT PRINTING OFFICE: 1970